SIONG NING HOLDINGS SDN. BHD.

v.

SUBANG COLDROOMS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[CIVIL APPEAL NO. 2 OF 1981]
26 AUGUST 1981

CIVIL PROCEDURE: *Appeal - Memorandum and record of appeal - Application to dismiss appeal on grounds memorandum not served within time prescribed in O. 55 r. 2(2) of the Rules of the High Court 1980.*

By notice of motion the applicant sought an order that the appeal be dismissed with costs on the grounds that the memorandum of appeal and appeal record were not served within the time prescribed in O. 55 r. 2(2) of the Rules of the High Court 1980. The application was dismissed with costs. The applicant appealed.

The two main areas of dispute were:

(1) The date which appears in the endorsement of the Registrar of the Sessions Court, Kuala Lumpur, in the appeal record as the date on which Form 40 was served on the appellant's solicitors was recorded as 25 January 1981. But in a letter dated 20 January 1981 written by the appellant/defendant's solicitors to the Sr. Registrar, Sessions Court, Kuala Lumpur, the date given as the date on which they received Form 40 was 20 January 1981.

(2) The date on which the applicant actually received the memorandum of appeal was also in dispute. The applicant contended that they only received the memorandum of 9 February 1981. However, Exhibit 7 in the affidavit of one Chelvarajah dated 24 April 1981 replying to the affidavit supporting the motion seemed to show that 3 February 1981 was the date that the registered letter was received by the applicant's firm as shown in the endorsement on the said exhibit. The applicant filed an affidavit in reply attached to which was Exhibit "OCB 3" which shows 4 February 1981 as the date on which the AR card and letter arrived in Kuala Lumpur, therefore making it impossible for the same to have been received by the applicant on 3 February 1981.

It was conceded on behalf of the applicant that if the notice in Form 40 had been served on the appellant on 25 January 1981, then the last day of service of the memorandum of appeal would be 9 February 1981. But they contended that as in fact the appellants were served on 20 January 1981, the last day of service was 3 February 1981, and as they had received the memorandum of appeal only on 9 February 1981, the service was therefore 6 days out of time.

Held:
By the learned Judge, Hashim Yeop A. Sani J that the service of the memorandum of appeal and appeal record were not out of time.

[1] The endorsement of the Senior Registrar, Sessions Court, Kuala Lumpur, appearing in the appeal record must be taken to be authoritative as the date on which Form 40 was served on the solicitors, that is 25 January 1981, as against any date purported to be given in a private document. Order XXXIX r. 3(4) (b) of the Subordinate Court Rules 1950 then provided

that the Registrar shall forward to the appropriate Assistant Registrar of the High Court the remaining copies of the record **"having endorsed on one of the copies** the date of service of the notice mentioned in sub-rule (2) of this rule."

[2] Based on the appeal record, the last day for service of the memorandum of appeal was 9 February 1981, as the 8th was a Sunday (s. 36(b) of the Interpretation and General Clauses Ordinance 1948).

[3] Relying on Exhibit 7 attached to the affidavit of Chelvarajah, the memorandum of appeal and appeal record were sent by AR. registered post on 30 January 1981. The Sessions Court, Kuala Lumpur, acknowledged receipt on 3 February 1981 and the High Court Kuala Lumpur received the same on or before 4 February 1981.

[4] Even assuming that Form 40 was received by the appellant on 20 January 1981, then 3 February 1981 would be the last day of service, the memorandum of appeal and appeal record would have been received by the applicant on 3 February 1981, but for the fact that the applicant's firm was closed from 3rd and reopened only on 9 February 1981, after the Chinese New Year holidays.

O. 62 r. 6(1) of the Rules of the High Court 1980 provides that the service of the document may be effected *inter alia* by pre-paid registered post. Unless the contrary is proved, service is deemed to be effected by properly addressing, pre-paying and posting the letter containing the document and at the time by which the letter could have been delivered in the ordinary course of post. (Section 2 Interpretation and General Clauses Ordinance, 1948). When service of process is allowed by registered post, "then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular". (Per Lord Denning LJ in *R. v. Appeal Committee of Country of London Quarter Sessions ex parte Ross* [1956] QB 682 at 694 cited with approval by Salmon LJ in *Saga of Bond Street Ltd. v. Avalon Promotions Ltd.* [1972] All ER 545)

[Application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 55 r. 2(2), O. 62 r. 6(1)
Subordinate Court Rules 1950, O. XXXIX r. 3(4)(b)
Interpretation and General Clauses Ordinance 1948, ss. 2, 36(b)

For the applicant - G.H. Ong
For the respondent - Rashid Ali

Also found at [1982] CLJ 116